Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-992

ANAHEIM OPERATING, INC., a Corporation Doing Business as SHERATON-ANAHEIM, and PETER J. LORUSSO,
Petitioners,

v.

HOTEL & RESTAURANT EMPLOYEES & BARTENDERS UNION, LONG BEACH & ORANGE COUNTY, LOCAL 681, AFL-CIO,
An Unincorporated Association,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeal of the State of California
Fourth ~~Second Appellate~~ District, Div 2

GERALD TOCKMAN
LOUIS N. LADERMAN
Law Offices of Gerald Tockman,
Attorney at Law,
A Professional Corporation
706 Chestnut, Suite 1010
St. Louis, Missouri 63101
(314) 241-8909
Attorneys for Petitioners

Of Counsel:
RICHARD C. GREENBERG
DEMARCO, BERAL, GREENBERG,
THRALL & SLUSHER
Suite 5500
707 Wilshire Boulevard
Los Angeles, California 90017
(213) 680-2850

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeal of the State of California
Second Appellate District

Petitioners, Anaheim Operating, Inc., doing business as the Sheraton Anaheim Hotel, and Peter J. Lorusso, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, in the case of *Hotel and Restaurant Employees and Bartenders Union, Long Beach and Orange County, Local 681, AFL-CIO v. Anaheim Operating, Inc., etc., et al.*, 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978).

OPINION BELOW

The Opinion of the Court of Appeal, rendered July 12, 1978, is reported at 82 Cal. App. 3d 737, 147 Cal. Rptr. 510, and is reproduced at Appendix A. A timely Petition for Hearing in the California Supreme Court was denied without opinion on September 20, 1978, and the unreported Order of the California Supreme Court is reproduced at Appendix B.

JURISDICTION

This Petition for Writ of Certiorari is filed within ninety days of the Order of the California Supreme Court of September 20, 1978, denying hearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Does the National Labor Relations Act, 29 U.S.C. § 141, et seq., preclude a labor union from maintaining a defamation action against an employer based on statements made during the course of a union organization campaign which the National Labor Relations Board has declared to be "protected expression" within the meaning of Section 8(c) of the NLRA, 29 U.S.C. § 158(c), and which allegedly injured the union both as a collective bargaining agent for employees and in its efforts to organize the employees of the employer.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141, et seq., are set out at Appendix C.

STATEMENT OF THE CASE

This matter was initiated on April 11, 1977, upon the complaint of Hotel and Restaurant Employees and Bartenders Union, Long Beach and Orange County, Local 681, AFL-CIO (herein "Union") alleging that Anaheim Operating, Inc., doing business as Sheraton Anaheim Hotel (herein "Hotel") and its employee, Peter J. Lorusso printed, published, circulated and distributed a writing on or about March 18, 1977, libelous to Union. This writing, a "Staff Memo" signed by Lorusso and circulated to Hotel's employees as part of a National Labor Relations Board (herein "NLRB") supervised representation campaign[1] stated, in pertinent part:

> "In the next weeks before the election we will be giving you 'Facts' about Hotel and Restaurant Employee Local 681, and why you don't need that Union here.
>
> "Over the years I have felt, and I feel even more strongly now, that the Hotel Union has nothing to offer our people. Both myself and our Hotel feel this way not because we are 'against Unions' but—as 'The Facts' will tell you—BECAUSE WE ARE PRO-EMPLOYEE. Those 'Facts', taken from the Union's own records—will show:
>
> . . .
>
> "What the Union's connections with organized crime and other 'underworld' elements are. . . ."
>
> (C.T. at 53).[2]

After alleging that the purported libelous statement contained in the "Staff Memo" was either known by Hotel and Lorusso

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[1] Union was seeking to represent the employees of Hotel. The NLRB scheduled election, held on April 29, 1977, resulted in the employees of Hotel rejecting Union as their collective barganing representative.

[2] References to the Clerk's Transcript will be made herein by the letters "C.T.", followed by page numbers.

to be false when made or made with reckless disregard for its truth or falsity, Union contended, in its complaint:

> "7. In publishing the said statements defendants, and each of them, acted deliberately and with intent to harm the plaintiff in its activities in organizing and attempting to organize the employees of the defendant, ANAHEIM OPERATING, INC. as members of the plaintiff.
>
> "8. As a direct and proximate result of the said misconduct of the defendants, and each of them, the plaintiff has been injured in its business and occupation as a collective bargaining agent for employees within the hotel and restaurant industry, has been exposed to hatred, contempt, and ridicule and has caused the plaintiff to be shunned and avoided by the employees of the defendant, ANAHEIM OPERATING, INC. so as to create damage to the plaintiff in organizing the said employees and in conducting an election campaign for an election to be held on April 29, 1977, by the National Labor Relations Board. Plaintiff is thereby entitled to general damages. (C.T. at 2-3).

Union sought general and punitive damages, costs and attorneys' fees.

Also on April 11, 1977, Union filed an unfair labor practice charge with the NLRB (C.T. at 43, 98), alleging that ". . . the employer [Hotel] distributed the attached bulletin falsely alleging the Union to be connected with organized crime and the underworld", in violation of Section 8(a)(1) of The National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1).[3]

[3] The National Labor Relations Act (herein "NLRA") of 1935, 29 USC §151, et seq. (the "Wagner Act"), regulated the conduct of employers only. In 1947, Congress amended the NLRA by enacting the Labor Management Relations Act (herein "LMRA"), 29 USC §141, et seq. (commonly referred to as the "Taft Hartley Act" or simply the "Act"), to regulate the conduct of labor organizations. The terms "LMRA", "NLRA", and "Act" are used interchangeably in decisions and are so used herein.

The NLRB, on May 4, 1977, refused to issue a complaint, stating:

> "As a result of the investigation, it does not appear that further proceedings are warranted. . . . [T]he investigation revealed . . . that the Employer's preelection campaign newsletter alleged as unlawful is protected expression within the meaning of Section 8(c) of the Act [29 U.S.C. § 158(c)]. *Shopping Kart Food Market*, 228 NLRB No. 190 [(1977)]." (C.T. at 44, 95).

Hotel and Lorusso demurred to Union's complaint contending that the trial court had no subject matter jurisdiction, in that the NLRB had exclusive and primary jurisdiction of the matters raised therein (C.T. at 7-8). The Superior Court sustained the demurrer, dismissed the complaint without leave to amend, after Union declined to amend upon being afforded an opportunity to do so, and entered judgment in favor of Hotel and Lorusso (C.T. at 99-104). Union appealed from the judgment (C.T. at 105-106) and the Court of Appeal of the State of California, Fourth District, reversed (Appendix A). A timely Petition for Hearing in the Supreme Court of the State of California was denied on September 20, 1978 (Appendix B).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises an Important Question Which Has Not Been, But Should Be, Settled by This Court

Review should be granted to resolve a substantial question not heretofore decided by this Court, *viz.*, whether state courts can assert jurisdiction over a defamation action brought by a union against an employer based on statements made during the course of a representation campaign, which the NLRB has declared to be "protected expression" within the meaning of the Act, and which allegedly injured the union both as a collective bargaining agent for employees and in its efforts to organize the employees of the employer.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court considered "[t]he extent to which the variegated laws of the several states are displaced by a single, uniform national rule . . .", *Id.*, at 241, and announced general guidelines to enable the lower courts to analyze the accommodation between competing federal and state power and between conflicting judicial and administrative jurisdiction without the need for continuous supervision by the Court. See, *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289-290 (1971).

Under *Garmon*, conduct actually or arguably protected or prohibited by Section 7 of the LMRA (29 U.S.C. § 157) or by Section 8 of the LMRA (29 U.S.C. § 158) may not be regulated by the states, but lies within the exclusive jurisdiction of the LMRA. *Garmon*, supra, 359 U.S. at 244-45. "Pre-emption is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of formal legal standards, that is the proper focus of concern." *Lockridge*, supra, 403 U.S. at 292. If the "crux" of an action is conduct which is actually or arguably subject to

the LMRA and the exclusive jurisdiction of the NLRB, the courts cannot exercise jurisdiction over the action. See, *Plumbers Union v. Borden*, 373 U.S. 690, 697-98 (1963).

This Court, however, has

> ". . . refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of Garmon if that activity 'was a mere peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' [Garmon], at 243-244 . . ." *Farmer v. Carpenters*, 430 U.S. 290, 296-97 (1977).

Accordingly, in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), the Court considered the extent to which the federal labor laws superceded state law with respect to libels published during a labor dispute, held that the exercise of state court jurisdiction in an action for libel arising out of a labor dispute brought by an individual was merely a peripheral concern of the LMRA, and recognized an overriding state interest in protecting its residents from malicious libels. *Linn*, supra, 383 U.S. at 61. But in order to prevent ". . . abuse of libe' action, and unwarranted intrusion upon free discussion envisioned by the Act",[4] *Id.*, at 65, this Court adopted the "actual malice" standard enunciated in *New York Times v. Sullivan*, 378 U.S. 254 (1964)[5] "by analogy rather than under constitutional compul-

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[4] It was noted that the threat of libel suits might "dampen the ardor of labor disputes and truncate the free discussion envisioned by the Act, . . . be used as weapons of economic coercion . . ., and pose a threat to the stability of labor unions and smaller employers." *Id.* at 64.

[5] Thus holding that statements published without knowledge of their falsity or without reckless disregard for their truth were not actionable under state law but were in fact preempted.

sion," *Linn*, supra, 383 U.S. at 65, and required that the plaintiff could "not recover except upon proof of such harm . . . [as] would be recognized by state tort law." *Id.* See also, *Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974).

The Court in *Linn* was concerned with the maintenance of a defamation action by an individual, an incidental and peripheral casualty to the labor dispute between the union and the employer.[6] Similarly, the plaintiffs in the cases decided by this Court subsequent to *Linn* which dealt with preemption of personal tort actions in state courts were individuals. See, *Farmer v. Carpenters*, supra; *Letter Carriers v. Austin*, supra. Determination of the question presented here is vital to the preservation of uniform national labor policy, the scheme of regulation of the Act, and the analysis of the appropriate accommodation between conflicting state and federal, judicial and administrative interests.

During fiscal year 1977, the NLRB conducted 9,795 representation elections. See, 42 NLRB Ann. Rep. 289 (1977).[7] The pre-election organization campaign, where union and employer compete with one another for the votes of the employees sought to be represented by the union, is one of the central concerns of the LMRA. These campaigns are often characterized by "bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions". *Linn*, supra, 383 U.S. at 58. In fact, in competing for employee votes, the intent of the union and the employer during the course of an organization campaign is to do damage to the other.

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[6] The court below improperly construed the holdings in *Linn* as being specifically applicable to all defamation actions arising from labor disputes, whether brought by individuals, employers or unions. See, 82 Cal. App. 3d at 753, 147 Cal. Rptr. at 519 (Appendix A, pp. A-18-A-19), citing *Linn*, supra, 383 U.S. at 53, 55 and 66.

[7] Figures for fiscal year 1978 are not yet available.

To allow a state court to assert its jurisdiction over a libel action brought by a labor union against an employer based on alleged defamatory organization campaign statements would be tantamount to sanctioning state interference in and regulation of the permissible scope of such election campaign statements, a matter central, not peripheral, to the LMRA. The state interest in regulating such organization campaign statements and in protecting a labor union engaged in an organization campaign from the effects of such statements must be considered far removed and minor given the overriding federal concern in and regulation of the area.

The interference such assertion of jurisdiction will cause with uniform federal labor policy is punctuated by the ruling of the court below in the factual context of the case at bar: that Union's cause of action for libel, seeking damages measured as the injury to its status as a collective bargaining agent in the hotel and restaurant industry and the injury caused by its loss of the representation election, is not preempted despite the nature of the injuries alleged as well as the NLRB's determination that the speech in question is "protected expression" within the meaning of the Act. The court below apparently felt that it was constrained to rule as it did, noting that "[d]espite the position urged upon us, the United States Supreme Court remains the final authority on the meaning and construction of the act . . . and . . . recently . . . reiterated its support of *Linn*." 82 Cal. App. 3d at 760, 147 Cal. Rptr. at 524 (Appendix A, p. A-28). Absent review by this Court, precedent for interference with the uniform federal regulatory scheme and the chilling of organization campaign speech will be allowed to stand.

The Court in *Linn* stressed:

> ". . . *[I]f experience shows that a greater curtailment, even a total one, should be necessary to prevent an impairment of that [uniform national labor] policy, the Court*

> *will be free to reconsider today's holding*. We deal here not with a constitutional issue but solely with the degree to which the state remedies have been preempted by the Act." 383 U.S. at 67 (emphasis added).

A total curtailment of defamation actions by unions against employers for injuries allegedly caused by organization campaign statements is necessary to prevent an "unwarranted intrusion upon free discussion envisioned by the Act," *id.*, at 65, as the "actual malice" test is insufficient to protect that interest when one of the combatants to the election campaign is allowed to sue the other for libel. By merely possessing such a weapon, a labor union can easily achieve the ends the *Linn* majority's "actual malice" test was designed to avoid. *Linn*, supra, 383 U.S. at 64, 65. See also *id.*, at 67-69 (Black, J., dissenting), and 69-74 (Fortas, J., dissenting). Hotel and Lorusso do not advocate an overthrow of *Linn*. Rather, it is submitted that qualification of *Linn* is necessary to assure that the assertion of state court jurisdiction cannot impinge upon federally protected and regulated conduct.

II. The Court Below Misconstrued the Decisions of This Court.

Exception to the preemption of state jurisdiction over cases touching upon or concerning labor relations requires that the conduct at issue in the case be a "peripheral concern" of the LMRA. *Garmon*, supra, 359 U.S. at 243-44. Even if the matter touches upon "deeply rooted" local interests, *id.*, exception to preemption is not appropriate if the matter is of central concern to the Act or if assertion of state court jurisdiction would ". . . threaten important interests protected by the Act. . . ." *Sears, Roebuck and Co. v. Carpenters*, — U.S. —, 56 L.Ed. 209, 240 f.n. 5 (1978) (Brennan, J., dissenting). Because the nature of organization campaign speech is a matter of central concern to the LMRA, and assertion of jurisdiction over Union's cause of action would impinge upon the "uninhibited, robust and wide-open debate[ ]"[8] envisioned by the Act, the Court of Appeal's ruling is grievously in error.

The NLRB exercises broad discretionary authority in regulating the scope of representation campaign speech. See, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1960); *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *Peerless of America, Inc. v. NLRB*, 576 F.2d 119, 122 (7th Cir. 1978). In the exercise of this discretionary authority, the NLRB possesses the power to revise previously promulgated principles. See, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975).

The central concern of the LMRA and the discretionary regulation by the NLRB over the scope of representation campaign speech is underscored by recent NLRB decisions.

In *Hollywood Ceramics Company, Inc.*, 140 NLRB No. 36 (1962), the NLRB ruled, in response to a post-representation election objection predicated upon an allegedly false or grossly misrepresentative pre-representation election statement, that it would examine the substantiality and materiality of the purported misrepresentation, and if the misrepresentation was found to have violated the "laboratory conditions" required for an election to assure employee freedom of choice, the NLRB would set aside the election results. The NLRB overruled *Hollywood Ceramics*, supra, in *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190 (1977), stating that it would "no longer probe into the truth or falsity of the parties" campaign statements made during an organization campaign. *Id.*, 228 NLRB at 1311. On December 6, 1978 the NLRB ". . . return[ed] to the standard of review for misrepresentations most cogently articulated in *Hollywood Ce-*

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[8] *Letter Carriers*, supra, 418 U.S. at 273.

ramics Company, Inc.", supra, expressly overruling *Shopping Kart*, supra. *General Knit of California, Inc.*, 239 NLRB No. 101, slip op at 4 (1978).

Given the shifting policy of the NLRB over the regulation of representation election speech, and the central focus of the LMRA over such speech, assertion of state court jurisdiction over defamation actions brought by unions against employers based on organization campaign speech disserves national labor policy and is tantamount to state regulation of such speech. The considerations and concerns of federal labor policy far outweigh the state interests at issue here, contrary to the conclusions drawn by the court below.

Further, no determination of the substance of Union's complaint can be made without regard to the merits of the underlying labor controversy, an impermissible inquiry. See *Farmer*, supra, 430 U.S. at 299-300; *Linn*, supra, 383 U.S. at 64; *United Automobile Workers v. Russell*, 356 U.S. 634, 649 (1958) (Warren, C.J., dissenting). The "crux" or gravamen of Union's complaint focuses on speech made during the course of the organization campaign, allegedly published ". . . with intent to harm [Union] in its activities in organizing and attempting to organize the employees of . . ." Hotel (C.T. at 2). Union seeks damages, based on the alleged defamatory speech, for alleged injury to its status as a collective bargaining representative and to its efforts to organize the employees of Hotel. The complaint as thus framed[9] unavoidably requires an inquiry into matters foreclosed from judicial cognition.[10]

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[9] Union declined the offer of the trial court to allow it to amend its complaint (C.T. at 100-101).

[10] Although this fact was implicitly recognized by both opinions below, see 82 Cal. App. 3d at 754-55, 147 Cal. Rptr. at 520 (Appendix A, pp. A-19-A-21), and 82 Cal. App. 3d at 761-62, 147 Cal. Rptr. at 524-25 (Kaufman, Assoc. J., concurring) (Appendix A, p. A-29), the Court of Appeal failed to grasp its overriding import.

Finally, the determination of the NLRB that the very speech challenged here as defamatory is "protected expression" (C.T. at 44, 95)[11] requires that the state court be ousted of jurisdiction over Union's complaint. Cf., *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, supra, 56 L.Ed.2d at 228-29.

> "*Certainly if conduct is eventually found by the National Labor Relations Board to be protected by the Taft-Hartley Act, the State cannot be heard to say that it is enjoining that conduct for reasons other than those having to do with labor relations* . . . . Controlling and therefore superceding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber v. Anheuser-Busch*, 348 U.S. 468, 479-80 (1955) (emphasis added).

Thus, the Court below misconstrued applicable decisions of this Court in ruling that Union's cause of action was not preempted.

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[11] It should be noted that the NLRB determination was contained in a refusal to issue an unfair labor practice complaint upon Union's charge that the representation campaign newsletter violated §8(a)(1) of the Act, 29 USC §158(a)(1). C.T. at 43, 98. Union never filed post-election objections with the NLRB.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners Hotel and Lorusso respectfully pray that this petition for writ of certiorari be granted.

Respectfully submitted,

GERALD TOCKMAN

LOUIS N. LADERMAN
Law Offices of Gerald Tockman, Attorney
at Law, a Professional Corporation
706 Chestnut, Suite 1010
St. Louis, Missouri 63101
(314) 241-8909
Attorneys for Petitioners

Of Counsel:

RICHARD C. GREENBERG
DEMARCO, BERAL, GREENBERG,
THRALL & SLUSHER
Suite 5500
707 Wilshire Boulevard
Los Angeles, California 90017
(213) 680-2850

APPENDIX

APPENDIX A

Hotel & Restaurant Employees & Bartenders Union, Long Beach & Orange County, Local 681, AFL-CIO, an unincorporated association, Plaintiff and Appellant,

v.

Anaheim Operating, Inc., a corporation doing business as Sheraton-Anaheim, Peter J. Lorusso, et al., Defendants and Respondents.

Civ. 19353

Court of Appeal, Fourth District
Division 2

July 12, 1978

Hearing Denied Sept. 20, 1978

McDANIEL, Associate Justice.

The action in the trial court was for defamation and brought by the Hotel & Restaurant Employees & Bartenders Union (Union) against Anaheim Operating, Inc., doing business as the Sheraton-Anaheim Hotel (Hotel) and its employee, Peter Lorusso. Hotel and Lorusso demurred to Union's complaint on the ground that the state court was without jurisdiction to hear the suit. The trial court sustained the demurrer and afforded Union an opportunity to amend. However, Union chose to stand on its complaint. As a consequence, the complaint was dismissed and judgment was entered in favor of Hotel and Lorusso. Union now appeals from that judgment.

FACTS

Early in 1977, a National Labor Relations Board (NLRB) supervised election was scheduled for April of that year for the purpose of enabling employees of Hotel to choose an exclusive bargaining agent. Union participated in the pre-election campaign, hoping to gather sufficient votes to become the employees' agent. Also, as part of that campaign, Hotel circulated a "Staff Memo," signed by Lorusso, which stated: "In the next [few] weeks before the election we will be giving you 'Facts' about Hotel and Restaurants Employees Local 681, and why you don't need that union here.

Over the years I have felt, and I feel even more strongly now, that the Hotel Union has nothing to offer our people. Both myself and our Hotel feel this way not because we are 'against Unions' but—as 'The Facts' will tell you—BECAUSE WE ARE PRO-EMPLOYEE. Those 'Facts', taken from the Union's own records—will show: . . . What the Union's connections with organized crime and other 'underworld' elements are . . ."

On April 11, Union lodged a complaint with the NLRB, charging Hotel with unfair labor practices within the meaning of section 8, subdivision (a) of the National Labor Relations Act.[1]

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[1] Section 8, subdivision (a) of the National Labor Relations Act is found at 29 U.S.C. section 158. It provides:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

As the basis for the charge, Union claimed that ". . . the employer distributed the attached bulletin falsely alleging the Union to be connected with organized crime and the underworld."

The Regional Director of NLRB responded to Union's charge with a letter stating that an investigation of the charge had been made and "[a]s a result of the investigation, it does not appear that further proceedings on the [charge] are warranted . . . [T]he investigation revealed . . . that the Employer's preelection campaign newsletter alleged as unlawful is protected expression,

within the meaning of Section 8(c)[2] of the Act. *Shopping Kart Food Market*, 228 NLRB No. 190. I am, therefore refusing to issue a complaint in these matters."

On the same day that Union filed the charge noted, April 11, it also filed suit for defamation against Hotel and Lorusso in the Orange County Superior Court. In its complaint, Union alleged that the statement inferring its connection with organized crime and underworld elements was false, and that Hotel and Lorusso made the statement either knowing it to be false or with reckless disregard for its truth or falsity. Union further alleged that, in publishing the statement, Hotel and Lorusso acted deliberately and with intent to harm it in its efforts to organize the employees. Union then stated, "As a direct and proximate result of the said misconduct . . . [Union] has been injured in its business and occupation as a collective bargaining agent for employees within the hotel and restaurant industry, has been exposed to hatred, contempt, and ridicule and has caused [Union] to be shunned and avoided by the employees of [Hotel] so as to create damage to the plaintiff in organizing the said employees and in conducting an election campaign for an election to be held on April 29, 1977 by the National Labor Relations Board [Union] is thereby entitled to general damages." For these alleged wrongs, Union prayed for punitive damages in the sum of $1,000,000, plus costs and attorneys' fees.

On April 29, the election was held. Union was not chosen as the employees' bargaining agent.

In May, Hotel and Lorusso filed a demurrer to Union's complaint, claiming that the state court was without jurisdiction to

[2] Section 8, subdivision (c) of the National Labor Relations Act is found at 29 U.S.C. section 158. It provides:

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

hear the suit "in that the matters there alleged lie within the exclusive and primary jurisdiction of the National Labor Relations Board." The trial court sustained the demurrer, and, as stated above, offered Union an opportunity to amend its complaint. Union declined to amend, and the trial court then dismissed the complaint and entered judgment in favor of Hotel and Lorusso. Union appeals from the judgment. We conclude that the position urged by Union is correct, we, therefore, reverse the judgment.

ISSUE, DISCUSSION AND DISPOSITION

[1] We are presented with one question: whether a state court may hear a defamation action based on particular speech which the NLRB has declared to be "protected expression within the meaning of section 8(c)"[3] of the National Labor Relations Act (the act), and which, the plaintiff has alleged, exposed it to hatred, contempt and ridicule in the hotel and restaurant industry. Responding to this question first calls for an analysis of the extent to which the jurisdiction of the NLRB over labor relations preempts possible state jurisdiction. The thorough and skillful analysis of this issue by counsel for both parties prompts a review of the development of the law of federal preemption in the field of labor relations, and a description of the present state of that law. This review and description will be accomplished in the first part of the opinion. We will then determine the applicability of the law of preemption to the particular facts of the case before us. We will conclude by discussing the impact if any on this case of the NLRB's decision in the *Shopping Kart* case.

[3] Section 8 generally defines what an unfair labor practice is. Section 8, subdivision (c) specifically focuses on expressions of particular views, and declares them not to be unfair labor practices. It must be kept in mind that section 8, subdivision (c) neither grants specific rights, as does section 7, nor does it prohibit certain conduct, as does section 8, subdivisions (a) and (b).

[2] Basically, when Congress grants to a federal agency the exclusive power to occupy a specific field of regulation, the law of preemption provides that state regulation of that field is strictly forbidden. Thus, if Congress intended to permit the NLRB, *alone*, to govern labor relations, state courts could not entertain suits which attempt to penalize conduct within that area. Just where the line is to be drawn in labor-management relations regulations between exclusive federal jurisdiction and federal/state concurrent jurisdiction has long troubled the United States Supreme Court.

Early cases suggested that states could apply their own common law, but could not apply state rules specifically enacted to regulate labor regulations. (*Motor Coach Employees v. Lockridge*, 403 U.S. 274, 290, 91 S.Ct. 1909, 29 L.Ed.2d 473.) Other early decisions allowed the states to interject themselves into labor relations where they could provide a remedy not available under federal law. (*Id.* at p. 291, 91 S.Ct. 1909.) Still others allowed state intervention so long as state court decisions were not inconsistent with federal labor law. (*Id.*) All these approaches were eventually rejected by the court. (*Id.*)

A workable rule finally began to emerge beginning with the 1953 decision in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775. There, the union had peacefully picketed the employer and attempted to persuade the employer's customers to boycott the company as part of the effort to force the employer's acceptance of a "closed shop" agreement. In the action that followed, the California Supreme Court upheld a damage award against the union. Both parties conceded that the union's conduct constituted an unfair labor practice under section 8, subdivision (b) of the act.[4]

[4] Section 8, subdivision (b) of the act is found at 29 U.S.C. section 158. It provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor or-

ganization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: "*Provided,* That nothing in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution;

"(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

"(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

When the case reached the United States Supreme Court, it began its opinion by discussing the extent of federal preemption of the labor area: " '. . . [T]he Labor Management Relations Act[5] "leaves much to the states, though Congress has refrained from telling us how much" . . . The penumbral area can be rendered progressively clear only by the course of litigation. [Citation.] . . .

In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration." (*San Diego Bldg. Trades Council v. Garmon, supra,* 359 U.S. 236, 240, 241-242, 79 S.Ct. 773, 777-78.)

The court then formulated the following general rule: "When it is clear or may fairly be assumed that the activities which a

"(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (c) shall be construed to prohibit any picketing, or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection."

[5] The Labor Management Relations Act was a 1947 amendment to the National Labor Relations Act. The latter act, as it was originally enacted in 1935, governed only practices *by employers.* The 1947 amendment, which added subdivision (b) to section 8 of the act, dealt with conduct by *unions.*

State purports to regulate are protected by § 7 of the National Labor Relations Act,[6] or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." (*Id.* at p. 244, 79 S.Ct. at p. 779.)

However, the court recognized two exceptions to this general rule: it would "not . . . [withdraw] from the States [the] power to regulate [1] where the activity regulated was a merely peripheral concern of the Labor Management Relations Act[,]" and (2) "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (*Id.* at pp. 243-244, 79 S.Ct. at p. 779.) The court concluded that the peaceful picketing and economic pressure which formed the basis of the suit did not fit within either of the categories excepted. Therefore, under the general rule formulated, it held that the state court could not exercise jurisdiction in the case before it.

Following *Garmon*, the Supreme Court handed down its decision in *Linn v. United Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582. During a campaign to organize employees, the union circulated a leaflet alleging that the em-

[6] Section 7 of the act is found at 29 U.S.C. section 157. It provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

ployer's general managers lied to employees. The company had also lodged an unfair labor practice complaint with the NLRB. The board, however, rejected the company's request for relief because it found that the leaflet had not been distributed by the union or its agents. Linn, a general manager, then filed suit against the union in federal court seeking damages for defamation. The United States District Court dismissed the action stating as its ground, under *Garmon*, that the NLRB had exclusive jurisdiction because the activity was arguably an unfair labor practice. The Circuit Court of Appeal affirmed.

The Supreme Court began its analysis of the case by noting that "[l]abor disputes are ordinarily heated affairs . . . representation campaigns are frequently characterized by bitter and extreme charges . . . vituperations, personal accusations, misrepresentations and distortions." (*Id.*at p. 58, 86 S.Ct. at p. 660.) It further noted that federal labor policy favored free debate on issues dividing labor and management, and that the NLRB had a legitimate interest in uniform regulation of labor relations. On the other hand, the court recognized the states' interest in protecting its citizens from *defamatory* attacks. The court stated that its determination of the extent to which the jurisdiction of the NLRB superseded that of state courts in defamation actions represented an accommodation of these conflicting interests. That accommodation was contained in the following rule. "[Where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice[7] and injured him."[8] (*Linn v. United Plant Guard Workers, supra*, 383 U.S. 53, 55, 86 S.Ct. 657, 659.)

[7] A defamatory statement is made "with malice" if it is made with knowledge of its falsity or with reckless disregard for its truth or falsity. (*Linn v. United Plant Guard Workers, supra*, 383 U.S. 53, 61, 86 S.Ct. 657.)

[8] The types of injury which may serve as the basis for a defamation suit include "general injury to reputation, consequent mental suf-

This "departure from . . . [the] well-established rule" (*id.* at p. 72, 86 S.Ct. 657) announced in *Garmon* was justified on several grounds: First, statements uttered with malice are not entitled to the protection of section 7 of the act, which allows employees to form, join, or assist labor organizations and to bargain collectively and engage in concerted activity, and to refrain from any of the above activities. Because section 7 does not protect the utterance of malicious defamation, state regulation of such defamation is "a 'merely peripheral concern of the Labor Management Relations Act[.]' " (*Linn v. United Plant Guard Workers, supra,* 383 U.S. 53, 61, 86 S.Ct. 657, 662.) As stated above, *Garmon* specifically held that state regulation of matters which peripherally concerned the act constituted an exception to the general rule and was permissible.

Second, the opinion declared that the state has "an overriding . . . interest" in protecting its citizens from malicious libel, and this interest "is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by Garmon." (*Linn v. United Plant Guard Workers, supra,* 383 U.S. 53, 62, 86 S.Ct. 657, 663.)

Third, it continued, " '[t]o the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated . . .' " (*Id.* at pp. 61-62, 86 S.Ct. at p. 662.)

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fering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law." (*Linn v. United Plant Guard Workers, supra,* 383 U.S. 53, 65, 86 S.Ct. 657, 664.)

This particular test was utilized because while the NLRB tolerated "intemperate, abusive and inaccurate statements," it would not allow malicious defamation. (*Letter Carriers v. Austin,* 418 U.S. 264, 272-273, 94 S.Ct. 2770, 41 L.Ed.2d 745.)

Fourth, "[w]hile the Board might find that an employer or union violated § 8 [outlawing unfair labor practices] by deliberately making false statements, *or* that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation . . . has no relevance to the Board's function. [Citation.]" (*Id.* at p. 63, 86 S. Ct. at p. 663; emphasis added.)

Fifth, "[t]he Board can award no damages, impose no penalty, or give any other relief to the defamed individual.

On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for preemption." (*Id.* at pp. 63-64, 86 S.Ct. at pp. 663-64.) "The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized." (*Id.* at p. 64, fn. 6, 86 S.Ct. at p. 664.)

Sixth, "damages for personal injuries may be assessed without regard to the merits of the labor controversy . . .

Judicial condemnation of the alleged attack [on plaintiff's character] would reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy." (*Id.* at p. 64, 86 S.Ct. at p. 664.)

Linn was followed in 1974 by *Letter Carriers v. Austin, supra,* 418 U.S. 264, 94 S. Ct. 2770. During the Letter Carriers' organizational drive, a list of postal workers who refused to join the union was published in the union's newsletter, along with a description of these individuals as "scabs," "two-legged animal[s] with . . . corkscrew soul[s], . . . water brain[s], . . . combination backbone[s] of jelly and glue" and other non-complimentary terms. (*Id.* at p. 268, 94 S.Ct. at p. 2773.) A libel action in state court followed. A demurrer was interposed to the complaint on the ground that the suit sought regulation of speech that was protected by the first amendment and federal labor law. However, the trial court overruled the demurrer, relying on *Linn*. An award of damages was returned by the jury and affirmed by the state's supreme court. The United States Supreme Court, after it heard the case, reaffirmed much of its earlier analysis in *Linn* and concluded, although the state courts had jurisdiction to proceed in defamation actions, that in this particular action the language did not constitute libel.

The last decision, *Farmer v. Carpenters,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338, was handed down in March 1977. There, a union member sued the union in the Los Angeles Superior Court for intentional infliction of emotional distress. The member alleged that the union discriminated against him in making referrals for employment because of his unpopular views and that it had thereby breached its collective bargaining agreement with him. He further claimed that the union "engaged in outrageous conduct, threats, and intimidation, and had thereby caused him to suffer grievous emotional distress . . ." (*Id.* at p. 293, 97 S.Ct. at p. 1059.)

A demurrer was filed by the union in which it claimed that the suit was preempted by the NLRB's exclusive jurisdiction. The trial court sustained the demurrer as to the discrimination and breach of the collective bargaining contract causes of action, but denied it as to the emotional distress allegation. The case

went to trial on that issue, and both general and punitive damages were awarded by the jury on that theory. The Court of Appeal reversed, stating that the "crux" of the action was conduct which was *arguably* subject to the exclusive jurisdiction of the NLRB.

The United States Supreme Court accepted the case, and after hearing it, began its unanimous opinion by discussing the exceptions to the *Garmon* rule which had developed over the years by means of both congressional action[9] and court decision. As to the latter salient, state actions involving mass picketing and threats of violence, wrongful expulsion from union membership, and "malicious libel" (*id.* at p. 297, 97 S.Ct. 1056) came to be permitted because they concerned the act only peripherally and were deeply rooted in local feeling and responsibility. The court stated that these exceptions "highlight our responsibility . . . to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential interference with the federal regulatory scheme." (*Farmer v. Carpenters, supra,* 430 U.S. 290, 297, 97 S.Ct. 1056, 1062.) ". . . [I]nflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." (*Id.* at p. 302, 97 S.Ct. at p. 1064.)

In applying some of the factors present in the *Linn* case to the case before it, the court stated that the act did not protect the "outrageous conduct" which was the subject of the suit. "[T]here is no federal protection for conduct on the part of union officers which is so outrageous . . ." (*Id.*) The court recognized the state's interest in keeping its people free from emotional distress as analogous to its interest in regulating defamation.

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[9] Statutory exceptions to the general *Garmon* rule can be found at 29 U.S.C. sections 164, subdivision (c), 185 and 187.

[3] From this progression of decisions, it is clear that there is a willingness to subordinate the *Garmon* rule of preemptive NLRB jurisdiction where other more pressing state interests are present. Whether or not the rule is to be bypassed in a particular situation "must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." (*Vaca v. Sipes*, 386 U.S. 171, 180, 87 S.Ct. 903, 911, 17 L.Ed.2d 842.) Therefore, in deciding whether or not to subordinate the *Garmon* rule in this instance requires our review of the interests at stake and of the effect of such subordination on national labor policies.[10] (*Sears Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, — U.S. —, 98 S.Ct. 1745, 56 L.Ed.2d 209.)

[4] As to the first point, *Linn* recognizes that the NLRB has an interest in maintaining a uniform labor policy and in promoting the free exchange of ideas during an election. The state, however, has a cognizable interest in protecting its citizens from malicious defamation. The court in *Linn* labeled this latter interest "overriding" and " 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by Garmon." (*Linn v. United Plant Guard Workers, supra*, 383 U.S. 53, 62, 86 S.Ct. 657, 663). Thus, according to *Linn*, the state interest in this area of activity outweighs competing federal interests. We must now decide if the state interest in protecting individual citizens from malicious defamation applies with equal force to defamatory-type statements directed at a labor union.

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[10] Hotel and Lorusso argue that "*Linn* [did not create] a blanket preemption exemption for libel actions arising in a labor relations context." Without discussing the merits of this statement, suffice it to say that the only test we are obliged to utilize in deciding whether to avoid the implications of the *Garmon* rule is that stated above. (*Farmer v. Carpenters, supra*, 430 U.S. 290, 297, 97 S.Ct. 1056; *Vaca v. Sipes*, supra, 386 U.S. 171, 180, 87 S.Ct. 903.)

We turn then to an application of the foregoing principles and inquiries to the facts before us. Hotel and Lorusso assert that the Union's interest in remaining free from malicious defamation is "not and never [has] been held to be cognizable under state law . . ." They add that unlike an individual, a union and an employer have the resources and forum available to defend themselves again such defamation,[11] and that *Linn* applies only to individuals.

[5] As to the first point, the California Supreme Court has concluded that "the social and economic realities of the present-day organization of society has . . . led [courts] to recognize the suability of unions. [Fn. omitted.] . . . If, however, we hold that these organizations are thus subject to suit but that they cannot sue, we create a gross anomaly. We cannot arbitrarily split so obvious an equation. [Fn. omitted.]" (*Daniels v. Sanitarium Ass'n, Inc.*, 59 Cal.2d 602, 607-608, 610, 30 Cal.Rptr. 828, 832-33-34, 381 P.2d 652, 656-57-58.) Thus, the court ruled that a labor union, as an entity, could sue another for defamation. This pronouncement by our Supreme Court clearly indicates that the Union's interest in remaining free from defamation is indeed cognizable. The nature of the Union's interest can be analogized to that of a corporation which has an interest in preserving its good business reputation. Accordingly, "language which casts aspersions upon its business character is actionable." (*Di Giorgio Fruit Corp. v. AFL-CIO*, 215 Cal. App.2d 560, 571, 30 Cal. Rptr. 350, 356.) We therefore can find no basis for the proposition that the Union's interest in remaining free of malicious libel is not protected by state law.

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[11] Hotel and Lorusso carry the distinction between the individual and the Union or employer further by claiming that suits brought by an individual are cognizable while those brought by the Union or the employer are not. However, *R. H. Bouligny, Inc. v. United Steelworkers of Amer.*, 270 N.C. 160, 154 S.E.2d 344; *Mooi Roofing Company v. De Young*, 9 Mich. App. 295, 156 N.W.2d 617, and *Farah Mfg. Co. v. Amalgamated Clothing Wkrs., etc.*, Tex.Civ. App. 483 S.W.2d 271, were all state suits brought by *companies* against the union.

Next, Hotel and Lorusso claim that resources to combat defamation are readily available to unions and employers, but not to individuals. They fail to tell us what those resources are, or how effective they may be; however, we note that *Linn* has been applied without hesitation to allow suits by corporations for activities occurring during union organizational campaigns. (*Farah Mfg. Co. v. Amalgamated Clothing Wkrs., etc., supra,* Tex.Civ.App., 483 S.W.2d 271; *Mooi Roofing Company v. De Young, supra,* 9 Mich.App. 295, 156 N.W.2d 617, *R. H. Bouligny, Inc. v. United Steelworkers of Amer., supra,* 270 N.C. 160, 154 S.E.2d 344.) In light of this, it would be unfair to deny a union the same privilege. Surely, Hotel and Lorusso cannot argue that a union somehow has resources to defend itself which an employer does not have.

The final contention, that *Linn* does not apply to unions and employers but only to individuals, is also without merit. An identical contention was made in *Mooi Roofing Company v. De Young, supra,* 9 Mich.App. 295, 156 N.W.2d 617. Therein, the Michigan court concluded: "To restrict the *Linn* decision in such a manner would result in an incongruity—a State court could entertain a defamation suit arising out of a labor dispute where a natural person is maliciously injured, but not where an employer or union is defamed." (*Id.* at p. 620.) Indeed, the language found in *Linn* indicates that it was intended to apply to unions, employers, and employees alike. The court stated: "We conclude that where *either party* to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." (*Linn v. United Plant Guard Workers, supra,* 383 U.S. 53, 55, 86 S.Ct. 657, 659; emphasis added.) The court also discussed and dismissed the possibility that "*employers and unions* [would] spurn appropriate administrative sanctions" if state suits were available. (*Id.* at p. 66, 86 S.Ct. at p. 665; emphasis added.) It is

apparent that the court wished to make *Linn* equally applicable to suits brought by unions, employers and individuals. Hotel and Lorusso have presented us with no persuasive reason to draw distinctions between the three.

[6] Having determined that the state interests in permitting suits are sufficiently strong, we must examine the effect that subordination of the *Garmon* rule in this instance would have on national labor policy. Hotel and Lorusso argue that permitting a state suit in this instance would interfere with uniform federal labor policy and would stifle the free flow of debate which that policy seeks to promote.

The consistency of federal labor policy may well not be as important as Hotel and Lorusso believe it is. "[T]he . . . fact that Congress and this Court have deferred to the States in these areas indicates a subordination of the interest in uniformity to the interests of the States . . . [T]he interest in uniformity is subordinated to the larger interests that persons injured . . . have preserved to them whatever remedies state law may authorize . . . [T]he 'rule' of uniformity that the Court invokes today is at best a tattered one, and at worst little more than a myth." (*Motor Coach Employees v. Lockridge, supra,* 403 U.S. 274, 317-318, 91 S.Ct. 1909, 1933-34, White, J. dissenting.)

Hotel and Lorusso first claim that, in its complaint, Union "requests the court below to assess the effect of [the] pre-election conduct upon the election." They further assert that "the nature of [Union's] injury [is] the effect that pre-election conduct had upon its reputation among the employee-electorate," and that the complaint "seeks damages, or the 'value' of its injury, equal to the 'value' of the loss of the election."

Because of the nature of Union's claims, Hotel and Lorusso argue that the substance of their complaint cannot be decided without regard to the merits of underlying labor controversy,

"an impermissible inquiry." However, close scrutinization of the complaint reveals that the Union claims to have been injured "in its business and occupation as a collective bargaining agent for employees within the *hotel and restaurant industry*." (Emphasis added.) Union also claims further injury in that it has "been exposed to hatred, contempt, and ridicule *and* [the defamation] has caused the plaintiff to be shunned and avoided by the employees of the [Hotel]." (Emphasis added.)

The first two of these claims are totally unrelated to the labor dispute between Union and the Hotel employees. The initial claims state that Union's reputation in the general business community has been injured and that Union has been exposed to hatred, etc., before *all* observers, and not merely workers at Hotel. Because we are obliged to give liberal construction to the Union's pleadings, we cannot ignore these allegations of injury which are unrelated to the labor dispute between the Union and Hotel.[12] Additionally, the complainant could not possibly have been seeking damages for "the 'value' of the loss of the election," as Hotel and Lorusso claim it did. The complaint was filed on April 11 and the Union did not lose the election until April 29.

Contrary to the position urged by Hotel, *Linn* established, in its review, that the NLRB "looks only to the coercive or misleading nature of the statements rather than their defamatory

[12] The United States Supreme Court said most recently in *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters, supra,* — U.S. —, 98 S.Ct. 1745, 56 L.Ed.2d 209, that although the federal and state actions arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same. "The critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations . . . but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been . . . presented to the Labor Board." (*Id.* 98 S.Ct. at p. 1757.) As will be made clear in the latter part of the opinion, the state tort action here is quite different from the unfair labor practice's complaint brought before the board.

quality. The injury that the statements might cause to . . . reputation . . . has no relevance to the Board's function . . . [D]amages for personal injuries may be assessed without regard to the merits of the labor controversy. . . ." (*Linn v. United Plant Guard Workers, supra,* 383 U.S. 53, 63-64, 86 S.Ct. 657, 663-64.) We see no reason, nor have Hotel and Lorusso given us one, not to apply the court's analysis of the issue as stated in *Linn* to a defamation action brought by the Union.

[7] Next Hotel and Lorusso contend, because the NLRB has already decided that the so-called libelous speech is protected under the act, that the state court in the interests of uniformity may not hear a case involving such speech. However, both the fact that the conduct is or may be covered by the act and the NLRB's declaration that it is do not displace state jurisdiction.[13]

[13] In their brief, Hotel and Lorusso cite *Weber v. Anheuser-Busch,* 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546, as stating that if the NLRB finds conduct to be protected under the act, the state may not enjoin that conduct. This position is simply a restatement of the general rule enunciated in *Garmon.* However, *Linn,* which was decided after *Weber,* carved out an exception to the *Garmon* rule for malicious defamation lawsuits.

During oral argument, Hotel and Lorusso cited *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters, supra,* — U.S. —, 98 S.Ct. 1745, 56 L.Ed.2d 209, as further questioning this assertion. In *Sears,* the union peacefully picketed one of Sears' stores on store property. Sears brought an action to enjoin the trespass. On the basis of *Garmon's* exception for "conduct which touches interests 'so deeply rooted in local feeling and responsibility,' " the lower court deemed that jurisdiction properly rested with the state, and granted the injunction. The California Supreme Court reversed, finding that the picketing was arguably protected by section 7 of the act, thus, the state could not assume jurisdiction. The United States Supreme Court reversed the California Supreme Court, stating that, although the conduct was both arguably protected by section 7 and prohibited by section 8, the same factors which we have discussed in the text of this opinion militated against foreclosure of state jurisdiction.

The only reference made in *Sears* to a situation in which review by the NLRB precedes a state court action was the following dicta: "The primary jurisdiction rationale justifies premption only in sit-

In *Farmer* and *Linn*, the court while anticipating NLRB review in the form of an unfair-labor-practices complaint, was not deterred from concluding that the state court could, in each case, entertain an action for the tortious conduct committed. As a consequence, in the case now before us, we view the NLRB's decision not to take jurisdiction because the alleged defamatory statement is protected speech under section 8, subdivision (c) to be the equivalent of assuming, as the court has done in numerous cases, that the conduct there at issue was either protected by section 7 of the act or prohibited by section 8. In all of those cases, the court proceeded to allow state

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uations in which an aggrieved party has a reasonable opportunity . . . to invoke the Board's jurisdiction . . ." (*Id.* 98 S.Ct. at p. 1760.) We assume that it is this passage which Hotel and Lorusso believe countermands all that we have previously said. However, a careful reading of *Sears* demonstrates otherwise. Therein, the court explained that the theory of primary jurisdiction "is used to refer to the various considerations articulated in *Garmon* . . . that militate in favor of pre-empting state court jurisdiction . . ." (*Id.* 98 S.Ct. at p. 1758, fn. 29.) *Garmon*, like *Sears*, spoke of conduct which is protected by section 7 or prohibited by section 8, subdivisions (a) and (b). In the case now before us, the NLRB declared that Hotel's commentary was "protected . . . within the meaning of Section 8(c) . . ." That section grants no substantive rights, as does section 7, nor does it prohibit certain types of conduct, as does section 8, subdivisions (a) and (b). Rather, it merely states that certain expression shall not be deemed an unfair labor practice. We view the NLRB's use of the word "protected" in connection with section 8, subdivision (c) to be most unfortunate, for the section protects absolutely nothing.

The primary jurisdiction theory relates solely to conduct which is protected by section 7 or prohibited by section 8, subdivisions (a) and (b), and has no application to conduct within the meaning of section 8, subdivision (c). For conduct which is neither protected by section 7 nor prohibited by section 8, subdivisions (a) and (b), the test is whether Congress intended that conduct be regulated *exclusively* by the federal government. (*Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 146, 96 S.Ct. 2548, 49 L.Ed. 2d 396.) The Supreme Court's decision in *Linn*, which was cited with approval in *Sears*, indicates the court's belief that Congress did not intend to exclusively occupy the field of defamatory conduct. Thus, there is nothing in *Sears* that can be construed as prohibiting state jurisdiction over the Union's suit.

court actions where the interest in permitting such actions so required, this despite the fact that the conduct was also otherwise cognizable under the act. The only significance we can see in the NLRB's decision as noted is to foreclose further proceedings to have the election set aside by the NLRB, or to be "made whole" by the NLRB because an unfair labor practice had been committed. This in no way precludes a state court action, which as *Linn* pointed out has an entirely different focus than does a proceeding before the NLRB.

Finally, Hotel and Lorusso argue, if state courts are permitted to hear such suits, that "50 different standards of propriety during an organizational campaign" would be created, and thus uniformity would suffer. However, in such instances, "the Court has required that, in the interests of uniform development of the law, state courts must apply federal law." (*Motor Coach Employees v. Lockridge, supra*, 403 U.S. 274, 314, 91 S.Ct. 1909, 1931.) Accordingly, California had adopted the rule, enunciated in *Linn*, that the plaintiff, in order to make out a case for relief, in any action for defamation arising out of a labor dispute, must prove that the statement was made with malice and injured him. (*Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 600, 131 Cal.Rptr. 641, 552 P.2d 425; *Emde v. San Joaquin County etc. Council*, 23 Cal.2d 146, 154, 143 P.2d 20.) Thus, the danger of a standard of propriety different from that established in *Linn*, is non-existent if suit is brought in California.

We must also determine if allowing a suit in state court would interfere with the free exchange of ideas which federal labor policy seeks to promote. This question has been sufficiently answered by the court in *Linn*. Therein, the court emphasized that application of the "malicious defamation with resulting injury" requirement represented an accommodation of the free exchange of ideas and the prevention of defamation. We can find no better way to accommodate these conflicting interests. As in the "yelling 'fire' in a crowded theatre"

approach to First Amendment rights, free speech in the context of labor relations cannot go unbridled if it confronts an equally important interest militating against it. Therefore, we conclude that allowing state court actions for defamation will not impermissibly interfere with the free exchange of ideas in the labor relations arena.

Our examination of the interests at stake in allowing a state court action and the effect such a suit would have on federal labor policy compels us to conclude that the union should be allowed to bring suit for defamation. An excellent statement of our position herein is contained in *Mooi Roofing Company v. De Young, supra,* 156 N.W.2d 617: "Since the board is unconcerned with the dafamatory character of the statement, a judicial determination that the statements were libelous in character would have no effect upon the board's jurisdiction over the merits of the labor dispute itself. Thus the injury caused . . . by a defamatory statement is merely incidental to the board's inquiry and the application of state remedies would be a 'merely peripheral concern of the labor management relations act.' [¶] . . . [T]he states' concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility "that an overriding state interest" should be recognized.' [Fn. omitted.] The traditional justification for libel actions, namely the tendency of libel or slander to cause a breach of the peace, is closely related to the breach of the peace line of cases recognized in *Garmon.* The Supreme Court itself has recognized maintenance of the peace as one of the purposes of civil actions for libel. Moreover, the state is traditionally concerned with providing a peaceful forum to which [those] whose reputation have been damaged . . . can bring their claims. Balanced against such meaningful State interests, the use of the known lie as a tool has so little social utility that it should be afforded the minimum protection consistent with national labor policy.' [Fn. omitted.]" (*Id.* at p. 622.) We believe that the six factors justifying the *Linn* decision apply

with equal force where a defamation suit is brought by a union. Therefore, such a suit must be permitted.[14]

We turn finally to the impact of the NLRB's decision in the *Shopping Kart Food Market, supra,* 94 LRRM 1705, case on this case. We begin with *Shopping Kart's* predecessor, *Hollywood Ceramics,* 51 LRRM 1600, also an NLRB decision. In the latter case, the employer distributed a handbill to employees the day before the election which contained substantial misrepresentations. The NLRB concluded that the election should be set aside "only where there [had] been a misrepresentation or other similar campaign trickery, which involves a *substantial* departure from the truth, at a time which prevents the other party or parties from making an *effective reply,* so that the misrepresentation, whether deliberate or not [fn. omitted], may reasonably be expected to have a *significant impact* on the election." (*Id.* at p. 1601; emphasis added.) The crux of the NLRB's decision was that such misrepresentations interfered with the employees' free choice; therefore, the election was set aside.

In April 1977, the NLRB decided the *Shopping Kart Food Market* case. The company vice-president, on the eve of the election, had misrepresented to employees the amount of profit the company made. The NLRB stated, "[W]e decide today that the Board will no longer probe into the truth or falsity of the parties' campaign statements. Accordingly, we hereby overrule *Hollywood Ceramics.*" (*Id.* at p. 1705.) The NLRB stated that use of the *Hollywood Ceramics* rule had resulted in "extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increasing litigation, and a resulting decrease in

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[14] A suit for defamation may be brought on the ground that damage has been done to an entity's business reputation. (*Di Giorgio Fruit Corp. v. AFL-CIO, supra,* 215 Cal.App.2d 560, 571, 30 Cal. Rptr. 350.) For purposes of this appeal, it is sufficient to note that Union has alleged injury to its business reputation.

the finality of election results." (*Shopping Kart Food Market, supra,* 94 LRRM 1705, 1706.) This resulted from the fact that " '[d]eterminations regarding the *substantiality* and *materiality* of particular misrepresentations are necessarily highly subjective. It would be difficult for any tribunnal [sic] . . . to reach uniform and consistent results in the application of such standards. The *timing* test . . . may raise vexatious issues of fact regarding what is required for an "effective" opportunity to reply.' " (*Id.* at p. 1706.) It is precisely because the NLRB must, whenever an election is challenged, apply each of these "vague and flexible standards" before it may set aside an election and because a court could then pass upon the NLRB's determination in each case that confusion and lack of uniformity resulted. Court review of the NLRB's decisions was primarily responsible for inconsistent decisions and long delays.

The NLRB further stated that *Hollywood Ceramics, supra,* 51 LRRM 1600, was based on the NLRB's unwillingness "to leave the voters 'to sort out, with no protection from us, from among a barrage of flagrant deceptive misrepresentations,' " and on its "assumption that misleading campaign propaganda will interfere with employees' freedom of choice. Implicit in such an assumption is a view of employees as naive . . . whose decision . . . is easily altered by the self-serving campaign claims of the parties." (*Shopping Kart Food Market, supra,* 94 LRRM 1705, 1707.) However, the NLRB found that workers were no longer naive and should be allowed to assess precampaign statements for themselves. It concluded that "we will no longer set elections aside on the basis of misleading campaign statements." (*Id.* at p. 1708.)

[8] Hotel and Lorusso now claim, even if *Linn* permits the exercise of state court jurisdiction over this case, that "the major policy shift of the NLRB announced in *Shopping Kart* has expanded the scope of absolutely protected pre-election speech to such a degree that the preemption exception of *Linn* cannot apply to a cause of action by a union for libel . . ."[15] However, they forget that *Shopping Kart* merely held, for purposes of *affirming or rejecting election results,* that the NLRB would not look into the truth or falsity of the subject statements. The confusion and lack of uniformity inherent in the former approach necessitated the holding in *Shopping Kart.* In fact, the case did not at all deal with the issue of preemption, nor did it declare that the NLRB may not review the truth or falsity of a campaign statement when an unfair labor practice charge is brought based on the statement. Clearly, the focus of *Linn,* malicious injury to reputation, is far removed from the focus of *Shopping Kart,* the employees' ability to exercise free choice in an election.[16]

Hotel and Lorusso add that in *Linn* the court commented, "[I]f experience shows that a greater curtailment, even a total one, should be necessary [on defamation suits] . . . the Court will be free to reconsider today's holding." (*Linn v. United Plant Guard Workers, supra,* 383 U.S. 53, 67, 86 S.Ct. 657, 665.) They argue that this paved the way for what they allege is *Shopping Kart's* "curtailment" of defamation suits. However, we note that the United States Supreme Court said that

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[15] Hotel and Lorusso hint that because *Linn* cited the *Hollywood Ceramics* case, its validity was reduced by the overruling of the later decision. In *Linn,* the court cited *Hollywood Ceramics* in its presentation of the NLRB's approach to misrepresentation. Relying on cases other than *Hollywood Ceramics,* the court also stated that the NLRB would not tolerate *malicious* defamation. The malicious defamation test was imposed because of this and because it was necessary to accommodate the conflicting interests of federal labor policy and the state's interest in permitting defamation suits. However, in no wise can it be asserted that the holding in *Linn* is substantially or even notably dependent on the distinction formerly made by the NLRB between ordinary defamation and malicious defamation. None of the six factors listed by the court in its decision in *Linn* relates to the NLRB's then-established distinction. Therefore, the overruling of *Hollywood Ceramics* cannot be said to invalidate *Linn.*

[16] Nowhere in *Shopping Kart* is *Linn* discussed, nor does *Shopping Kart* deal with the distinction between ordinary defamation and malicious defamation, which is the key of the *Linn* decision.

it, and *not the NLRB*, may limit such suits when necessary. Despite the position urged upon us, the United States Supreme Court remains the final authority on the meaning and construction of the act (*R. H. Bouligny, Inc. v. United Steelworkers of Amer., supra*, 270 N.C. 160, 154 S.E.2d 344, 357), and as recently as May 15, 1978 reiterated its support of *Linn*. (See *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters, supra*, — U.S. —, 98 S.Ct. 1745, 56 L.Ed. 2d 209.) Additionally, as we stated above, we can see no inconsistency between *Linn* and *Shopping Kart* because the two cases dealt with the distinctly different issues.

Finally, Hotel and Lorusso argue that the high court has expanded the freedom of parties involved in elections to engage in "uninhibited, robust, and wide-open debates," citing *Letter Carriers v. Austin, supra*, 418 U.S. 264, 94 S.Ct. 2770. Therein, as we have noted, the union newsletter had printed several uncomplimentary comments about nonunion postal workers. The court reiterated the holding in *Linn* that if the plaintiff alleged malicious defamation and injury to himself, he could maintain his action. The court went on to find, based on past *Supreme Court* decisions, that the comments were, as a matter of law, not defamatory. The court's recognition of the importance of "uninhibited, robust and wide-open debate" in *Austin* was, by no means, new. Indeed, it was recognized in *Linn* as one of the factors to be balanced against the state's interest in penalizing defamation. The end result of this balancing process was, of course, the rule requiring the plaintiff to allege malicious defamation and injury to himself. We can carry *Austin* no further than this, and particularly we cannot agree with Hotel and Lorusso that *Austin* alters the effect of *Linn*.

The judgment is reversed, with directions to the trial court to afford defendants, Anaheim Operating, Inc. and Pete Lorusso, an opportunity to answer Union's complaint.

TAMURA, Acting P. J., concurs.

KAUFMAN, Associate Justice, concurring.

I concur fully in both the judgment of reversal and the reasoning in the main opinion. The purpose of this separate concurring opinion is to emphasize a point which may prove vital upon trial.

The point to be emphasized is that plaintiff's allegations concerning its injury and damages suffered by it are ambiguous.[1] It cannot be ascertained with any assurance of accuracy whether plaintiff claims to have suffered compensable injury to its reputation within the hotel and restaurant industry generally or whether the only injury it suffered was in organizing Anaheim's employees in respect to the representation election to be held April 29, 1977. Defendants did not challenge the sufficiency of these allegations by a demurrer on the ground no cause of action was stated or by special demurrers for uncertainty or ambiguity. They chose instead to demur on the sole ground of exclusive NLRB jurisdiction. Under these circumstances, we have given plaintiff the benefit of the doubt and viewed its allegations as including an allegation of compensable injury to its reputation within the hotel and restaurant industry generally. However, if the only injury alleged was to its reputation among Anaheim's employees, reducing its effectiveness in organizing those employees with respect to the representation election, the case would be an entirely different case and defendants' contention of exclusive NLRB jurisdiction might be meritorious.

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[1] Paragraph number 8 of the complaint reads: "As a direct and proximate result of the said misconduct of the defendants, and each of them, the plaintiff has been injured in its business and occupation as a collective bargaining agent for employees within the hotel and restaurant industry, has been exposed to hatred, contempt, and ridicule and has caused the plaintiff to be shunned and avoided by the employees of the defendant, ANAHEIM OPERATING, INC. so to create damage to the plaintiff in organizing the said employees and in conducting an election campaign for an election to be held on April 29, 1977 by the National Labor Relations Board. Plaintiff is thereby entitled to general damages."

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

September 20, 1978

I have this day filed Order:

Hearing Denied

In re: 4 Civ. No. 19353 Hotel & Restaurant Employees vs. Anaheim Operating, Inc.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX C

Statutes Involved

National Labor Relations Act
(61 Stat. 136, 73 Stat. 519,
29 U.S.C. Sec. 141, et seq.)

Sec. 7, 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Secs. 8(a), (b) and (c), 29 U.S.C. §§ 158(a), (b) and (c):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condtion of acquiring or retaining membership:

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer,

or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as

such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing; *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Secs. 9(a) and (c)(1), 29 U.S.C. §§-159(a) and (c)(1)

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of em-

ployment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Sec. 10(a), 29 U.S.C. § 160(a)

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

Supreme Court, U. S.
FILED
FEB 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-992

ANAHEIM OPERATING, INC.,
a Corporation Doing BUSINESS as
SHERATON - ANAHEIM,
and PETER J. LORUSSO,

Petitioners,

vs.

HOTEL & RESTAURANT EMPLOYEES &
BARTENDERS UNION, LONG BEACH &
ORANGE COUNTY, LOCAL 681, AFL-CIO,
An Unincorporated Association,

Respondent.

BRIEF OF RESPONDENT

CANTRELL AND GREEN INC.,
EDWIN J. WILSON
RICHARD J. CANTRELL
Attorneys for Respondent
200 Pine Avenue
P.O. Box 1700
Long Beach, California 90801
(213) 432-3121

LONG BEACH REPORTER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-992

ANAHEIM OPERATING, INC.,
a Corporation Doing BUSINESS as
SHERATON-ANAHEIM,
and PETER J. LORUSSO,

Petitioners,

vs.

HOTEL & RESTAURANT EMPLOYEES &
BARTENDERS UNION, LONG BEACH &
ORANGE COUNTY, LOCAL 681, AFL-CIO,
An Unincorporated Association,

Respondent.

BRIEF OF RESPONDENT

Respondent HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS UNION, LONG BEACH AND ORANGE COUNTY, LOCAL 681, AFL-CIO, respectfully replies to the Petition for Writ of Certiorari and submits the Petition should be denied.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari asks this Court to review the judgment of the Court of Appeals of the State of California in *Hotel and Restaurant Employees, etc. vs. Anaheim Operating, Inc., etc.* 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978).

This matter commenced in the Superior Court of the State of California. Respondent Union filed a complaint therein alleging defamation on the part of petitioners. The defamatory statement alleged "facts" to show

> "what the union's connection with organized crime and other 'underworld' elements are . . ."

The petitioners demurred on the grounds the California Superior Court had no jurisdiction. The contention of petitioners was that State Court jurisdiction had been pre-empted by the National Labor Relations Act. The demurrer was sustained without leave to amend and judgment entered thereon. The Union appealed. The California Court of Appeals reversed the trial court, holding the National Labor Relations Act did not pre-empt State Court jurisdiction for a defamation action.

QUESTION PRESENTED

Should the Supreme Court reverse its prior decisions recognizing the National Labor Relations Act does not pre-empt a State tort action where the subject matter thereof is of only peripheral concern to the National Labor Relations Board?

ARGUMENT

The California State Court Of Appeals Decision Raises No New Important Question Of Law Not Heretofore Settled By This Court.

The first ground urged in support of the Petition for Writ is that there is an important question remaining as to whether a Union can bring a defamation action against an employer based on statements made during a representation campaign. The petitioners allege the employer conduct is "protected expression" within the meaning of the National Labor Relations Act. No citation of authority supports that allegation. The allegation begs the question. If there is a question presented by the Writ, the question is whether malicious defamation is to be included in protected expression. The protected expression claimed by the defendants is set forth in Section 8(c) of the National Labor Relations Act, 29 USC §158 (c). That section provides:

> "the expressing of any *views, argument,* or *opinion,* or the dissemination thereof, whether

in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."
(emphasis added)

Nothing in Section 8 of the Act indicates a willful mis-statement of fact is protected.

The petitioners contend the prior decisions of this Court as to defamation actions should be reversed if the plaintiff is a labor union. This is the only distinction the petitioners make between this Court's decisions and the present case. This Court has previously ruled in *Linn vs. Plant Guard Workers*, 383 US 53 (1966) a State does have an interest in a libel published during a labor dispute. The only criteria applied by this Court was the requirement of "actual malice" as defined in *New York Times vs. Sullivan*, 378 US 254 (1964).

Subsequent decisions of this Court have upheld the State Court jurisdiction of tort actions. See *Letter Carriers vs. Austin*, 418 US 264 (1974). Furthermore the decision has been approved by this Court in *Farmer vs. Carpenters*, 430 US 290 (1977) and *Sears, Roebuck and Company vs. San Diego County District Council of Carpenters*, ___ US ___ (May 15, 1978).

Ultimately, the only point made by petitioners is that a Union should not have a right to bring a defamation action in the State Court. The California Court of Appeals in its decision pointed out it has been held a Union is subject to equal status with an individual or a corporation. A Union is entitled to sue or be sued. To say a Union can be sued for libel but cannot sue would create a "gross anomaly." *Daniels vs. Sanitarium Ass'n, Inc.*, 59 Cal. 2d 602, at 610. The Court of Appeals decision also pointed out the analogy between a Union's interest and that of a corporation, citing *DiGiorgio Fruit Corporation, vs. AFL-CIO*, 215 Cal. App. 2d 560 at 571. Therefore the Court concluded the Union's interest in remaining free of malicious libel was protected by state law. See Page A-17 attached to the Petition for Writ Certiorari.

The Court of Appeals properly points out at footnote 11 state suits have been brought by companies against Unions for libel. In addition the Court notes with approval the same contention was made and rejected in *Mooi Roofing Company vs. DeYoung*, 9 Mich. App. 295. (see page A-17, footnote 11, and page A-18 attached to the Petition.)

THE COURT OF APPEALS DECISION DOES NOT MISCONSTRUE THE DECISIONS OF THIS COURT.

The second justification for the Petition submitted by petitioners is an alleged misconstruction of the decisions of this Court. The contention is made that "the nature of organization campaign speech

is a matter of central concern to the LMRA" . . . (petitioners brief, page 10).

Again the petitioners beg the question. The question is whether the "truth or falsity" of campaign statements is a matter of peripheral concern to the Board. The Board underscored quite clearly the truth or falsity is but a peripheral concern in its three inconsistent decisions in *Hollywood Ceramics Company, Inc.*, 140 NLRB No. 36; *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190, and *General Knit of California*, 239 NLRB No. 101. The petitioners indicate these cases do reflect a "shifting policy" of the NLRB with the regulation of representation election speech. It can hardly be claimed the willful dissemination of false statement of facts under such circumstances can indicate anything other than "peripheral concern" of the NLRB.

It should be noted at the time the Court of Appeals decision issued the then posture of the NLRB was that the NLRB would not consider the truth or falsity of campaign statements. At that time the Board's position was the *Shopping Kart* decision, supra. The petitioners contended *Shopping Kart* made clear the State Court was without jurisdiction. *Shopping Kart* negated Board concern with the defamatory statements. Now the change in the membership of the NLRB has resulted in *Shopping Kart* being reversed by *General Knit.*

It should be noted those cases are NLRB decisions. No Supreme Court decision has reversed the *Linn*

decision. In fact each subsequent decision in the area of law cites with approval a language of *Linn.*

The decision of the Court of Appeals which is attached to the Petition indicates the Court's anaylsis of the original decision, *San Diego Bldg. Trades Council vs. Garmon*, 359 US 236 commencing on page A-6 and continuing through A-10. Commencing at the bottom of A-10 the Court of Appeals then analyzed the *Linn* decision and basis for State Court jurisdiction. Basically the Court pointed out the fact the NLRB has limited authority and has no basis for awarding damages or other penalties. Particularly the NLRB has no power to vindicate a reputation. See page A-13.

It is respectfully submitted the reading of the Court of Appeals decision can only lead to the conclusion the Court of Appeals correctly construed and applied the prior holdings of this Court that a willful defamation is actionable in State Court without regard to the National Labor Relations Act.

It is therefore respectfully submitted the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

EDWIN J. WILSON
RICHARD J. CANTRELL,
A Member of
CANTRELL & GREEN, INC.
Attorneys for Respondents